(4)

No. 06-1131

In The

Supreme Court of the United States

JOHN DAVIS,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF

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REPLY TO THE BRIEF FOR THE RESPONDENT IN OPPOSITION

At issue in this case is whether the District of Columbia Circuit's decision in *Oil, Chemical & Atomic Workers International Union v. Department of Energy*, 288 F.3d 452 (D.C. Cir. 2002) ("*OCAW*"), erred in extending to Freedom of Information Act ("FOIA") cases this Court's holding in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001) ("*Buckhannon*"). *Buckhannon* rejected the argument that the "catalyst theory" of attorney's fees applied to two civil rights statutes that make a "prevailing party" eligible for attorney's fees. *OCAW* extended this holding to FOIA cases where the statute makes plaintiffs eligible for attorney's fees if they have "substantially prevailed."

1. Respondent contends that petitioner's policy arguments are "no different in kind" in this FOIA case than those that were rejected in *Buckhannon*, and that "there is no justification for treating FOIA differently from other statutes with fee-shifting provisions. . . ." Opp. at 8. However, both petitioner and amici pointed out that unlike the cases at issue in *Buckhannon*, FOIA cases are easily mooted because they seek purely injunctive relief, and this has a devastating impact on attorney's fees and the enforcement of FOIA's disclosure mandate. *See* Brief for Public Citizen, The Electronic Frontier Foundation, Judicial Watch, and The National Security Archive ("Public Citizen's Br."), at 1-2, 6-8; Petition for a Writ of Certiorari ("Pet.") at 12-14.

Buckhannon itself noted this crucial distinction, saying "petitioners' fear of mischievous defendants only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant's change in

conduct will not moot the case." *Buckhannon*, 532 U.S. at 608-609. But as one authority has noted

> *Buckhannon*'s bar on catalyst attorneys' fees threatens FOIA actions to an even greater extent than it does traditional civil rights litigation. Many civil rights claims for damages are immune from *Buckhannon*'s greatest impact because defendants cannot easily moot damage claims by capitulating. Plaintiffs may reject settlement offers, increase their demands, or require attorneys' fees as part of a settlement. In the case of equitable relief, when defendants voluntarily remedy civil rights plaintiffs' injunctive claims, courts will not dismiss plaintiffs' actions as moot if the defendants might repeat the challenged conduct.

David Arkush, *Preserving "Catalyst Attorneys' Fees under the Freedom of Information Act in the Wake of Buckhannon Board and Home Care v. West Virginia Department of Health and Human Resources*, 37 Harv. C.R.-C.L. L. Rev. 131, 137 (2002) ("Arkush"). These circumstances do not apply to FOIA cases. As Arkush notes, plaintiffs "never claim damages under FOIA because the law does not provide for them, and they rarely seek ongoing injunctive relief or declaratory judgments." *Id.* at 138.

Because of how FOIA litigation works, the opportunities for running the plaintiff's costs up and then mooting the action without a judgment are manifold. First, although the FOIA calls for "prompt" disclosure of nonexempt records, it is often necessary for a requester to file a suit simply to receive a response. Either an agency makes no release or only a partial release before suit is filed. The suit itself compels the agency to release some materials. If the FOIA plaintiff decides at this point that the release is

adequate, the case will end without any judgment or decree in plaintiff's favor having been entered. The plaintiff will have succeeded, will have been effective in prying loose records, but under *OCAW* would not be eligible for attorney's fees despite the fact that he received all the records he sought and promoted FOIA's goal of informing the public about the government's activities.

After suit is filed, a government agency is generally required to file a *Vaughn* index[1] itemizing the responsive documents, or a random or selected sample thereof, and justifying the withholdings. In the process, the government may recognize that it cannot justify withholding some records and release them. In some instances, the creation of the *Vaughn* index may also lead the agency to reprocess some or all of the records not covered by the index. In either case, the plaintiff may be satisfied that he has achieved his goals and end the litigation. However, a district court, relying on *OCAW*, has held that "voluntary" *Vaughn* index disclosures do not make a FOIA plaintiff eligible for an award of attorney's fees. *See Committee for Responsible Transplantation v. FDA*, 448 F.Supp.2d 146 (D.D.C. 2006), currently pending on appeal as D.C. Cir. No. 06-0533.

Unlike other cases, in FOIA cases a government agency often gets multiple bites at the apple. Although FOIA litigants almost invariably file cross-motions for summary judgment, a judicial finding that the agency has failed to meet its burden of proof does not necessarily result in a judgment in the plaintiff's favor. Rather, the

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[1] The *Vaughn* index is a procedure devised by the D.C. Circuit in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), which requires an agency to describe and justify under oath its withholdings.

courts sometimes offer the agency a second (or third) opportunity to comply with its burden of proof. *See, e.g., Hall v. U.S. Dept. of Justice*, 26 F.Supp. 78, 80 (1998). If the agency then discloses records "voluntarily," the plaintiff will not have "substantially prevailed" under *OCAW*, and will not be eligible for attorney fees, despite having obtained the records he filed suit to get.

The ability of defendants to moot cases at any point before the court rules sometimes even after significant briefing, and to deny plaintiffs' attorney's fees even when they have received most, or even all, of the records they requested, may be clearly seen in the result reached in this case. Petitioner John Davis ("Davis") has obtained nearly all of the records he sued for. In a very real, non-illusory way, he has substantially prevailed in this litigation. Yet the D.C. Circuit has ruled he is not eligible for attorney's fees despite the great effort it took to achieve success.

2. Critical to the issue raised by this case is whether "prevailing party" and "substantially prevailed" mean the same thing. Both petitioner and amici argue that they are not synonymous. *See* Petition for a Writ of Certiorari ("Pet.") at 15; Public Citizen's Br. at 9. Respondent simply repeats *OCAW*'s assertions and states that there is "no textual basis" for treating the terms differently.

OCAW asserts that "prevailing party" is the "functional equivalent" of "substantially prevailed" without first attempting to define what "substantially" means. Without discussion or analysis, it adopts an essentially quantitative definition of "substantially." The dictionary definition of "substantial" does include "considerable in quantity." However, this is a tertiary definition. Included in the primary definition are "actual," "true," "essential," and

"not imaginary or illusory." *Merriam-Webster's Collegiate Dictionary* (Eleventh Edition). An interpretation of "substantially" that recognizes it to be a qualitative rather than quantitative term reflects the goals of FOIA's attorney's fee provision. The quantitative definition employed by *OCAW* would have a disastrous impact on attorney's fee awards in FOIA cases, and thereby upon the enforcement of FOIA itself. It would require plaintiffs to request and litigate over only a handful of known documents very likely to be disclosable in order to ensure they can receive attorney's fees when they prevail. Not only would this curtail the intent of FOIA to maximize the dissemination of information, but it would also be fruitless because a plaintiff frequently has no way of knowing in advance of litigation either the quantity of responsive documents or the merits of the withholdings.

In support of the *OCAW* result, respondent states

> As [*OCAW*] explained, "all must agree that a 'prevailing party' and a 'party who prevails' are synonymous"; thus, while FOIA's addition of the modifier 'substantially' might possibly be taken as *limiting* the category of 'prevailing parties,' * * * it cannot be taken as *expanding* the universe of parties eligible for a fee award."

Brief for the Respondent in Opposition ("Opp."), at 6, quoting *OCAW*, 288 F.3d at 455-456 (emphasis added by respondent).

But this is obviously not true if, as petitioner and amici contend, "substantially prevailed" refers to a success that is real, not illusory, rather than one that is based on a formal judgment or decree recording success on a certain percentage of the information sought. Of course, "substantially" modifies "prevails." So the meaning of "prevails"

must also be ascertained. "It is commonly accepted that words that are not legal terms of art, should be accorded their ordinary, not their legal meaning. . . ." Arkush, 37 Harv. C.R.-C.L. L. Rev. at 151, citing *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820) and other authorities at n. 100. Common usage defines "prevail" as meaning

> 1. To be greater in strength or influence; to triumph or win a victory. Often used with over or against. 2. To be or become effective: succeed; win out. 3. To be most common or frequent; be predominant. 4. To be in force, use, or effect; be current. 5. To use persuasion or inducement successfully.

Id., quoting *American Heritage Dictionary* 1038 (1st ed. 1969).

Thus, these definitions "indicate that 'prevail' simply means success, without the necessity of a legal judgment, in obtaining the substance of what was desired. That is precisely what a FOIA plaintiff achieves when the government cedes disputed documents before litigation has reached a judgment." *Id.* at 152. In view of this, the terms "prevailing party" and "substantially prevailed" are not "functionally equivalent" and there is a "textual basis" for distinguishing between FOIA and the statutes involved in *Buckhannon*.

3. Respondent initially states that "review is not warranted because the decision of the court of appeals in this case does not conflict with the decision of any other court of appeals." Opp. at 9. Subsequently, respondent makes clear that this applies only to post-*Buckhannon* appellate decisions. Respondent takes petitioner to task for having stated that "in most if not all circuits there are solid precedents applying the 'catalyst theory' to FOIA

cases," noting that petitioner cites only two such cases. *Id.* In fact, as one authority stated in 2002, "Every circuit that has considered catalyst fees under FOIA has approved of them, holding that a plaintiff substantially prevailed in a FOIA action if her lawsuit was reasonably necessary and substantially caused release of the requested records." Arkush, at 140, n.53.[2]

Since then, the D.C. and Second Circuits, relying on *Buckhannon*, have held that the catalyst theory does not apply in FOIA cases. See *OCAW*; *Union of Needletrades, Indus. & Textile Employees v. INS*, 336 F.3d 200 (2d Cir. 2003). However, in the other circuits, the ruling that the catalyst theory does apply in FOIA cases are controlling precedent, and they are in conflict with the D.C. and Second Circuits' decisions. And in the *Reinbold* case, the Fourth Circuit held that the catalyst theory applied to FOIA cases even though it had earlier ruled that it did not apply to civil rights statutes in *S-1 and S-2 v. State Bd. of Education*, 21 F.3d 49, 51 (4th Cir. 1994) (en banc), demonstrating that circuits may conclude that the catalyst theory applies in FOIA cases even when it does not apply in cases under other statutes with fee-shifting provisions.

4. Petitioner contends that the legislative history of the FOIA attorney's fees provision lends strong support to

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[2] Citing as examples *Maynard v. Central Intelligence Agency*, 986 F.2d 547, 568 (1st Cir. 1993); *Vermont Low Income Advocacy Council, Inc. v. Usery*, 546 F.2d 509, 513 (2d Cir. 1976); *Reinbold v. Evers*, 187 F.3d 348, 363 (4th Cir. 1999); *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1088 (5th Cir. 1981); *DeBold v. Stimson*, 735 F.2d 1037, 1041 (7th Cir. 1984); *Long v. IRS*, 932 F.2d 1309, 1313 (9th Cir. 1991); *Anderson v. Secretary of Health & Human Services*, 80 F.3d 1500, 1504 (10th Cir. 1996); *Chesapeake Bay Foundation, Inc. v. United States Department of Agriculture*, 11 F.3d 211, 216 (D.C. Cir. 1993).

his argument that Congress intended the catalyst theory to apply to FOIA attorney's fees awards. Respondent repeats *OCAW*'s assertion that the legislative history is "inconclusive." But this view of the legislative history is dramatically at odds with the views of other courts and the D.C. Circuit's own prior decisions. Indeed, that legislative history has been characterized as "unusually complete," *Vermont*, *supra*, at 512, and "extensive and illuminating," *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1363 (D.C. Cir. 1977). In *Kaye v. Burns*, 411 F.Supp. 897, 902 (S.D.N.Y. 1976), the court found that it would be "absurd" and "inconceivable" to deny catalyst fees. In *Nationwide Building Maintenance v. Sampson*, 559 F.2d 704, 715 (D.C. Cir. 1977) the D.C. Circuit said it would be "clearly contrary to congressional intent."

In another of its early cases, the D.C. Circuit aptly summed up the issue:

> If the government could avoid liability for fees merely by conceding the case before final judgment, the impact of the fee provision would be greatly reduced. The government would remain free to assert boilerplate defenses, and private parties who serve the public interest by enforcing the Act's mandates would be deprived of compensation for the undertaking. **Thus, a general bar to awards of fees in cases resolved before final judgment cannot be accepted by the court.**

Foster v. Boorstin, 561 F.2d 340, 343 (D.C. Cir. 1977) (emphasis added) (citations omitted).

5. Respondent notes that the Open Government Act which is pending before Congress specifies that FOIA permits recovery of attorney's fees based on a "voluntary

or unilateral change in position by the opposing party." While the House bill has passed, the Senate bill has not. Reports published in the press have stated that Senator Kyl has placed a block on the Senate bill, and that President George W. Bush has threatened to veto it.

CONCLUSION

The issue before this Court is one of exceptional importance because the decision of the D.C. Circuit in *OCAW* and in this case have created a precedent that severely undermines FOIA's attorney's fees provision. Without plaintiff being able to recover attorney's fees when their lawsuits serve as a catalyst for the government to release records, the prospects that citizens will be able to use FOIA robustly as envisioned by Congress are very dim. Review of the D.C. Circuit's decision in this case is needed to halt and reverse the erosion of a law that is fundamental to the exercise of democratic rights by the citizenry.

Respectfully submitted,

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